UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Mark W. DAVIS 454-02-6459

DECISION OF THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2228

Mark W. DAVIS

This appeal has been taken in accordance with title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 23 August 1979, an Administrative Law Judge of the United States Coast Guard at Boston, Massachusetts, after a hearing at Boston, Massachusetts, on 23 May and 2 August 1979, revoked the captioned document upon finding Appellant guilty of misconduct. The two specifications of the charge of misconduct found proved allege (1) that Appellant, while serving as able seaman aboard SS OVERSEAS ULLA, under authority of the above captioned document, did, on or about 15 May 1979, while said vessel was at sea, wrongfully assault and batter by beating with his fists a member of the crew, Lennie C. Jones; and (2) that Appellant, while serving as aforesaid, did on or about 15 May 1979, wrongfully assault with a dangerous weapon, to wit, a pair of pliers, a member of the crew, Lennie C. Jones.

Appellant did not appear and was not represented at the hearing, which was held in absentia.

The Investigating Officer introduced into evidence four documents and one deposition.

Subsequent to the hearing, the Administrative Law Judge entered a written decision in which he concluded that the charge and both specifications as alleged had been proved. He then entered an order of revocation.

The decision was served on 28 August 1979. Appeal was timely filed on 24 September 1979, and perfected on 15 January 1980.

FINDINGS OF FACT

Appellant was serving under authority of his merchant mariner's document as able seaman aboard SS OVERSEAS ULLA on 15 May 1979. Because of the disposition of this appeal, no further findings are necessary.

BASES OF APPEAL

This appeal has been taken from the decision and order of the Administrative Law Judge. It is contended that Appellant's hearing improperly was conducted in absentia, and that impermissible hearsay evidence was admitted into evidence at the hearing.

APPEARANCE: Roger Chism, Esq., Houston, Texas.

OPINION

I

On 21 May 1979, when the charge sheet was served upon appellant, he was serving aboard SS OVERSEAS ULLA on "foreign articles." Appellant, therefore, was required to remain in the service of that vessel. His hearing was set for 1000 on 23 May 1979." It appears that OVERSEAS ULLA sailed, with Appellant aboard, shortly after he had been served. Although Appellant questions on appeal the nature and adequacy of the notice of hearing provided to him, his primary argument is that he simply was not free to attend the hearing because of his prior contractual commitment to serve aboard OVERSEAS ULLA. The record indeed does support this contention of Appellant's. He was not discharged or otherwise released from the articles of OVERSEAS ULLA by the Master. The record contains no indication, however, that either the Investigating Officer or the Administrative Law Judge gave any consideration to this circumstance, although both apparently were aware of it. I have held that "[v]oluntary service aboard another vessel after having received adequate notice of the hearing does not excuse Appellant's failure to appear therein." Decision on Appeal No. 1917; see, also, Decision on Appeal No. 1785. Here Appellant's sailing aboard OVERSEAS ULLA obviously cannot be characterized as "voluntary," nor was it aboard another vessel. "I am mindful that a respondent properly given notice of a hearing should not be able arbitrarily to frustrate its commencement." Decision on Appeal No. 2182. Nevertheless, in determining the time and place for the hearing to be held (pursuant to 46 CFR 5.20-30), an investigating officer must give due consideration to scheduling difficulties over which a person charged has no control, such as a mandatory sailing. See, e.g., Decision on Appeal No. 678. This the Investigating Officer did not do. Hence, I conclude that Appellant is entitled to a new hearing.

II

A separate reason also compels me to vacate the order of revocation issued by the Administrative Law Judge. Near the close

of Appellant's in absentia hearing, after the charge had been found proved, the Investigating Officer made the following statements, "I feel from my conversation with DAVIS that he has no remorse for striking JONES with the channellocks, and I feel that the way this took place was that it was planned and calculated...The only point I was trying to make, I didn't feel compel-- I was talking with him and he readily asked me for a letter of warning, and I informed him that this wasn't a warning type offense, that it was more serious than that. And I don't feel myself that he had any remourse [sic] but what he thought this might have been the way to handle things at the time." I deem it highly improper for an investigating officer to state his observations of a person's "remorse" or lack of it when that person is not present at the hearing and has no opportunity to rebut. In a similar situation I have stated that, "imprecisions in a closing argument will stand as bases for appeal only where highly prejudicial or of obvious influence on the trier of fact." Decision on Appeal No. 2014. Here, although not a closing argument, the statements of the Investigating Officer certainly were "highly prejudicial." Worse yet, the initial decision of the Administrative Law Judge reveals that these statements did have an "obvious influence" upon his determination of an appropriate order. For this additional reason the order of the Administrative Law Judge is to be vacated.

ORDER

The order of the Administrative Law Judge, dated at Boston, Massachusetts, on 23 August 1979, is VACATED. The findings are SET ASIDE. The charges are DISMISSED without prejudice to the institution of further proceedings.

J. B. HAYES
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D.C., this 13th day of August 1980.